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UNITED STATES DISTRICT COURT
IN AND FOR THE SOUTHERN DISTRICT OF CALIFORNIA
(Honorable M. James Lorenz)

JUAN CARLOS VERA, an individual, Plaintiff, v. JAMES O'KEEFE III, an individual, HANNAH GILES, an individual,and DOES 1-20 inclusive, Defendants.	Case No. 10-cv-01422-L-JMA PLAINTIFF'S OPPOSITION TO DEFENDANT JAMES O'KEEFE'S MOTION TO DISMISS Date: April 11, 2011 Time: 10:30 a.m.

COMES NOW Plaintiff, JUAN CARLOS VERA, by and through his attorneys of record, Eugene G. Iredale and Julia Yoo, and submits this Opposition to the Defendant JAMES O'KEEFE's Motion to Dismiss and states the following:

FACTS

On August 18, 2009, Defendants O'Keefe and Giles visited the ACORN office in National City, California, wearing a hidden camera. (Complaint ¶¶10, 11) Defendants asked Mr. Vera whether the conversation would be kept confidential and Mr. Vera agreed. (Complaint ¶14) When Defendants began discussing underage prostitution, Mr. Vera continued to engage them in conversation so that he could report them to his cousin who was a police officer in National City, California. (Report of the Attorney General p. 14) After Defendants left the office, Mr. Vera

contacted his cousin and reported the incident. Mr. Vera's cousin then forwarded the report to San Diego Police Department. (Report of the Attorney General p. 15) While Mr. Vera was assisting the police investigation of underage prostitution, defendants released a heavily edited videotape of their confidential conversation with Mr. Vera on the Internet. *Id.* The content and the nature of the presentation of the edited videotape suggested that Mr. Vera was complicit in promoting underage prostitution.

In May of 2010, Defendant O'Keefe pled guilty to violations of Title 18, United States Code, Sections 1036(a)(1) and 2 (entry by false pretenses onto real property of the United States). This involved another case in which O'Keefe and his co-defendants entered a federal building with the apparent aim of wiretapping the telephone system of United States Senator Mary Landrieu located in the Hale Boggs Federal Building in New Orleans, Louisiana. Defendant O'Keefe is currently on probation for that offense.

ARGUMENT

Defendant O'Keefe's motion is based on a claim that Penal Code § 632 is a substantially overbroad restriction on the First Amendment. O'Keefe asserts that § 632 is facially invalid and plaintiff's complaint must be dismissed. For the purposes of this motion, the parties are to assume that O'Keefe violated § 632 and assume further that the U.S. Constitution did not protect him in doing so. The only issue to be addressed is whether § 632 is unconstitutionally overbroad. There is before the Court no evidence that O'Keefe was acting as a journalist, a freelance television producer or a family member preserving conversations with intimate familial association. His claim is that the statute on its face is unconstitutional. He asks this Court to be the only Court in the 44-year history of the statute to find it unconstitutional.

Defendant O'Keefe's only argument is based on the First Amendment. Because Penal Code § 632 is a law of general applicability unrelated to "expression," the First Amendment is not implicated. § 632 does not limit or prohibit one's ability to publish or express any thought or speech. It limits only the act of recording a confidential communication. It applies equally regardless of whether the person is a journalist, artist, or any other citizen. A constitutional

challenge is not available to O'Keefe.

1. O'Keefe Cannot Meet the Standard for a Facial Challenge.

The overbreadth doctrine is not casually employed. "Because of the wide-reaching effects of striking down a statute on its face at the request of one whose own conduct may be punished despite the First Amendment, we have recognized that the overbreadth doctrine is 'strong medicine' and have employed it with hesitation, and then 'only as a last resort.'" *New York v. Ferber*, 458 U.S. 747, 769 (1982). A statute may be invalidated on its face only if the overbreadth is "substantial." *Broadrick v. Oklahoma,* 413 U.S. 601, 615 (1973). "There must be a realistic danger that the statute itself will significantly compromise recognized First Amendment protections of parties not before the Court for it to be facially challenged on overbreadth grounds." *City Council of Los Angeles v. Taxpayers for Vincent*, 466 U.S. 789, 801 (1984).

A party "can only succeed in a facial challenge by establish[ing] that no set of circumstances exists under which the Act would be valid, i.e., that the law is unconstitutional in all of its applications." *Wash. State Grange v. Wash. State Republican Party*, 552 U.S. 442, 449 (2008) (internal citations omitted) "…A facial challenge must fail where the statute has a '"plainly legitimate sweep." *Id*. (internal citations omitted). In the First Amendment context, the party challenging the statute may prove that a law is overbroad by a showing that "a substantial number of its applications are unconstitutional, judged in relation to the statute's plainly legitimate sweep." *Washington State Grange v. Washington State Republican Party*, 552 U.S. 442, 449, n. 6, (2008) (internal quotation marks omitted). *United States v. Stevens*, 130 S. Ct. 1577, 1587 (U.S. 2010).

2. Newsgathering Agencies Enjoy No Immunity or Exemption from Generally Applicable Laws.

"Turning to the question of constitutional protection for newsgathering, one finds the decisional law reflects a general rule of nonprotection: the press in its newsgathering activities enjoys no immunity or exemption from generally applicable laws." *Shulman v. Group W*

Productions, Inc., 18 Cal. 4th 200, 239 (Cal. 1998) citing *Cohen v. Cowles Media Co.*, 501 U.S. 663, 669-670 (1991). The *Shulman* court analyzed *Branzburg v. Hayes*, 408 U.S. 665, 680-695 (1972) which concluded that press enjoys no special immunity from questioning regarding sources with information on criminal activities under investigation by grand jury; *Dietemann v. Time, Inc*., 449 F.2d 245, 249 (9th Cir. 1971) which held the First Amendment is not a license for electronic intrusion and investigative journalism can be successfully practiced without secret recording; and *Shevin v. Sunbeam Television Corp*. (Fla. 1977) 351 So.2d 723, 725-727 which found that Florida statute prohibiting nonconsensual recording of private conversations may constitutionally be applied to news reporters. *Id.* The *Shulman* court, in addressing media's intrusion, also found:

> "The constitutional protection accorded newsgathering, if any, is far narrower than the protection surrounding the publication of truthful material; consequently, the fact that a reporter may be seeking 'newsworthy' material **does not in itself privilege the investigatory activity.** The reason for the difference is simple: The intrusion tort, unlike that for publication of private facts, does not subject the press to liability for the contents of its publications. Newsworthiness, as we stated earlier, is a complete bar to liability for publication of private facts and is evaluated with a high degree of deference to editorial judgment**. The same deference is not due, however, when the issue is not the media's right to publish or broadcast what they choose, but their right to intrude into secluded areas or conversations in pursuit of publishable material**." *Shulman* at 240 (emphasis added).

A challenge based on the First Amendment is not available to O'Keefe. Penal Code § 632 does not prohibit the press from expression, speech or publication. "No basis exists, however, for concluding that either section 632 or the intrusion tort places such a burden on the press, either in general or under the circumstances of this case. The conduct of journalism does not depend, as a general matter, on the use of secret devices to record private conversations."[1] *Shulman v. Group W Productions, Inc*., 18 Cal. 4th 200, 239 n18 (Cal. 1998). "In short, the state may not intrude into the proper sphere of the news media to dictate what they should publish and

[1]"We strongly disagree . . . that hidden mechanical contrivances are 'indispensable tools' of newsgathering. Investigative reporting is an ancient art; its successful practice long antecedes the invention of miniature cameras and electronic devices." *Dietemann v. Time Inc*., 449 F.2d 245, 249; "News gathering is an integral part of news dissemination, but hidden mechanical contrivances are not indispensable tools of news gathering." *Shevin v. Sunbeam Television Corp*., supra, 351 So.2d 723, 727.

broadcast, but neither may the media play tyrant to the people by unlawfully spying on them in the name of newsgathering." *Shulman* at 242.

There is no special or disparate treatment accorded "expose journalism" under the Constitution. Any bully or a felon dressed as a telephone repairman can claim to be a "journalist" after committing a crime. O'Keefe is not immune from prosecution for breaking into an office or recording confidential communication because he calls himself a journalist. "California's intrusion tort and section 632 are both laws of general applicability. They apply to all private investigative activity, whatever its purpose and whoever the investigator, and impose no greater restrictions on the media than on anyone else. (If anything, the media enjoy some degree of favorable treatment under the California intrusion tort, as a reporter's motive to discover socially important information may reduce the offensiveness of the intrusion.) These laws serve the undisputedly substantial public interest in allowing each person to maintain an area of physical and sensory privacy in which to live. Thus, defendants enjoyed no constitutional privilege, merely by virtue of their status as members of the news media, to eavesdrop in violation of section 632 or otherwise to intrude tortiously on private places, conversations or information." *Shulman* at 239.

3. All Precedent and Legislative History Militate Against Finding Penal Code § 632 Unconstitutional.

According to Ddefendant O'Keefe, those engaged in gathering information for later distribution are not permitted to violate "valid" tort or criminal laws in the process, but a tort cause of action or criminal law is not "valid" unless it properly protects a legitimate state interest. (O'Keefe Motion to Dismiss p. 15) The protection of a person's general right to privacy is left largely to the states. *Katz v. United States*, 389 US 347, 350 (1967). California has long recognized the privacy rights of its citizens. "In 1967, upon determining that advances in science and technology have led to the development of new devices and techniques for the purpose of eavesdropping upon private communications and that the invasion of privacy resulting from the continual and increasing use of such devices and techniques has created a

serious threat to the free exercise of personal liberties and cannot be tolerated in a free and civilized society, the Legislature enacted the privacy act to protect the right of privacy of the people of this state." (§ 630.) *Friddle v. Epstein*, 16 Cal. App. 4th 1649, 1657 (Cal. App. 1st Dist. 1993). There are a dozen states that have implemented substantially similar statutes to protect their citizens.[2]

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[2]Conn - It is illegal to tape a telephone conversation in Connecticut without the consent of all parties. Conn. Gen. Stat. § 52-570d. Consent should be given prior to the recording, and should either be in writing or recorded verbally, or a warning that the conversation is being taped should be recorded.
FL - All parties must consent to the recording or the disclosure of the contents of any wire, oral or electronic communication in Florida. Recording, disclosing, or endeavoring to disclose without the consent of all parties is a felony, unless the interception is a first offense committed without any illegal purpose, and not for commercial gain. Fla. Stat. ch. 934.03. But under the statute, consent is not required for the taping of a non-electronic communication uttered by a person who does not have a reasonable expectation of privacy in that communication. See definition of "oral communication," Fla. Stat. ch. 934.02. *See also Stevenson v. State*, 667 So.2d 410 (Fla. Dist. Ct. App. 1996).
DE - Delaware privacy law makes it illegal to intercept "without the consent of all parties thereto a message by telephone, telegraph, letter or other means of communicating privately, including private conversation." Del. Code Ann. tit. 11, § 1335(a)(4).
IL - In Illinois, an eavesdropping device cannot be used to record or overhear a conversation without the consent of all parties to the conversation. 720 Ill. Compiled Stat. Ann. 5/14-1, -2.
Md - Under Maryland's Wiretapping and Electronic Surveillance Act, it is unlawful to tape record a conversation without the permission of all the parties. *See Bodoy v. North Arundel Hosp*., 945 F.Supp. 890 (D. Md. 1996).
Mass - It is a crime to record any conversation, whether oral or wire, without the consent of all parties. The penalty is a fine of up to $10,000 and a jail sentence of up to five years. Mass. Ann. Laws ch. 272 , § 99.
Mich - Any person who willfully uses any device to overhear or record a conversation without the consent of all parties is guilty of illegal eavesdropping, whether or not they were present for the conversation. Illegal eavesdropping can be punished as a felony carrying a jail term of up to two years and a fine of up to $2,000. Mich. Comp. Laws § 750.539c.
Mont - A reporter in Montana cannot tape record a conversation without knowledge of all parties to the conversation. See Mont. Code ann. § 45-8-213-c. Exceptions to this rule include the recording of: elected or appointed officials and public employees, when recording occurs in the performance of public duty; persons speaking at public meetings, and persons given warning of the transcription. If one party gives warning, then either party may record. Mont. Code ann. § 45-8-213-1-c-I, ii, iii.
NH - It is a felony to intercept or disclose the contents of any telecommunication or oral communication without the consent of all parties. N.H. Rev. Stat. Ann. § 570-A:2-I. It is punishable by imprisonment of one to seven years. N.H. Rev. Stat. Ann § 625:9. However, it is only a misdemeanor if a party to a communication, or anyone who has the consent of only one of the parties, intercepts a telecommunication or oral communication. N.H. Rev. Stat. Ann § 570-A:2-I. Misdemeanors are punishable by imprisonment up to one year. N.H. Rev. Stat. Ann § 625:9.
OR - One cannot use a device to record a conversation unless all parties of the conversation are informed. Or. Rev. Stat. § 165.540(1)(c)
PA - It is a felony of the third degree to intentionally intercept, endeavor to intercept, or get any other person to intercept any wire, electronic, or oral communication without the consent of all the parties. 18 Pa. Cons. Stat. § 5703(1).
WA - All parties generally must consent to the interception or recording of any private communication, whether conducted by telephone, telegraph, radio or face-to-face, to comply with state law. Wash. Rev. Code § 9.73.030.

4. O'Keefe's Argument regarding Public Officials is Moot because § 632 is Not Applicable to Public Officials Engaged in Public Affairs.

O'Keefe begins his analysis with a discussion of *Flanagan v. Flanagan*, 27 Cal. 4th 766, 777, (Cal. 2002) ("[A] conversation is confidential under section 632 if a party to that conversation has an objectively reasonable expectation that the conversation is not being overheard or recorded"). *Flanagan* involved a case in which a woman sued her stepson and her manicurist for secretly taping her conversations regarding her husband's estate and financial matters.

Immediately following the quote above from *Flanagan,* Defendant O'Keefe asserts the following:

> In so holding, that court has put its seal on the application of § 632 to a particular kind of communication: those made to individuals by public officials in the course of their duties. Thus, for a journalist or citizen to record anything a police officer, building inspector, sanitation official, or public officeholder says to him without the official's consent, provided the official has an objectively reasonable expectation that the conversation is not being overheard or recorded, violates § 632 as authoritatively construed by California state courts. And this is so even if the official has every expectation that the conversation will be repeated to others or made known to the public at large. (O'Keefe MTD p.4)

It is baffling how the California court of appeals may have "put a seal" on statements made by public officials in deciding *Flanagan*, a lawsuit involving a manicurist who recorded conversations about the plaintiff's alleged attempt to kill her husband who was suffering from prostate cancer. O'Keefe asserts, with no explanation or citation to law, that § 632 specifically applies to communications made to individuals by public officials in the course of their duties. His assertion is patently false.

§ 632 (c) states "The term 'confidential communication' includes any communication carried on in circumstances as may **reasonably indicate that any party to the communication desires it to be confined to the parties thereto, but excludes a communication made in a public gathering or in any legislative, judicial, executive or administrative proceeding open to the public**, or in any other circumstance in which the parties to the communication may reasonably expect that the communication may be overheard or recorded." (Emphasis added) All

of the scenarios presented by O'Keefe, such as a judicial process or "a police officer, building inspector, sanitation official, or public officeholder" making a statement in public or to a reporter, are specifically excluded from Penal Code § 632.

O'Keefe chronicles a lengthy dissertation on the issue of whether police officers in the scope of their duties may be recorded by citizens. "In short, California has no legitimate interest in banning citizens from making audio recordings of what public officials say to them in the course of many of their duties, and certainly no interest that outweighs the First Amendment interests citizens have in making such recordings." (O'Keefe MTD, p. 10) The fatal flaw in O'Keefe's argument is that Penal Code § 632 in no way penalizes recording of public officials in the course of their duties. § 632 (c) specifically excludes it.

§ 632 (c) excludes from criminal liability "any other circumstance in which the parties to the communication may reasonably expect that the communication may be overheard or recorded." In California, as in most states, dash cams installed in patrol cars record all interactions between police officers and citizens. All of the officers' statements made to dispatch are recorded. Officers engaged in their duties do not have an objectively-reasonable expectation that they will not be overheard or recorded. The very nature of their job requires them to be seen and heard by the public. § 632 does not prohibit motorists or other citizens from videotaping or recording police officers engaged in their duty in public. Defendant O'Keefe does not cite to a single criminal case in which a citizen was prosecuted under § 632 for recording the actions of a peace officer or a public official but maintains that California state courts have construed § 632 to include public officers' statements. (O'Keefe MTD p.4) This assertion is a fabrication.

5. PC§ 632 Does Not Criminalize Recording of Intimate Family Moments when There is No Reasonable Expectation of Privacy.

O'Keefe asserts that PC§ 632 penalizes the innocent use of video technology by individuals within their families. According to Defendant O'Keefe, "a husband who, seeking to preserve a spontaneous and unselfconscious family moment, surreptitiously turns a video recording device" on his wife would be unfairly punished by the statute. This argument, besides being creepy in the extreme, highlights the very necessity of the statute in intimate settings. If the

situation is such that a woman has a "reasonable expectation of privacy" in her own home, the husband certainly should not have the right to secretly turn a recording device on his wife. No doubt there have been numerous people who believed in their constitutional right to preserve a special moment. There have been a number of occasions in which a person "seeking to preserve a spontaneous" moment surreptitiously recorded the parties' engaging in sexual conduct. Courts across the country have uniformly found that those people committed crimes.[3] Secretly videotaping sexual encounters without the consent of partners is one of the most intimate and private forms of communication between two people and a violation of §632. *See People v. Gibbons*, 215 Cal.App.3d 1204 (Cal.App.4th Dist 1989).

The statute only involves recording in which the people have a "reasonable expectation of privacy." It does not prohibit members of a family recording each other in a spontaneous moments of harmless fun. If it is indeed "just harmless fun," then there would be no reasonable expectation of privacy.

6. O'Keefe's Argument regarding "a Popular Form of Television Entertainment" Does Not Suffice to Support a Constitutional Challenge.

O'Keefe asserts that §632 is an unjustifiable interference with artistic freedom of such shows as MTV's "Punk'd." These shows not only obtain the participant's release to air the shows but they are filmed in public places and often involve public figures. It would hardly be "artistic freedom" for a television crew to sneak into a person's house and surreptitiously record them in a confidential conversation. That is not what takes place on Punk'd or other shows like the Jamie Kennedy Experiment. A television show does not have open license to commit crimes in the name of high ratings or artistic freedom. Under certain circumstances, committing assault or battery on an unsuspecting victim may be hilarious with great comedic value, but the Constitution

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[3] *People v. Gibbons*, 215 Cal.App.3d 1204 (Cal.App.4th Dist 1989) (Defendant videotaped sexual encounters with three women utilizing a video camera which he had hidden in the closet); *People v. Drennan*, 84 Cal. App. 4th 1349, 1356 (Cal. App. 3d Dist. 2000)(Recording falls under PC§ 647 which provides every person "who looks through ... any other area in which the occupant has a reasonable expectation of privacy, with the intent to invade the privacy of a person or persons inside" is guilty of a misdemeanor.)

does not make exceptions for journalists or "art forms" such as Punk'd. In addition, "It is an essential element of a Penal Code section 632, subdivision (a) claim" to prove that the conversation that was taped was 'confidential.'" *See Wilkins v. National Broadcasting Co*., 71 Cal. App. 4th 1066, 1079 (Cal. App. 2d Dist. 1999).

A party "can only succeed in a facial challenge by "establish[ing] that no set of circumstances exists under which the Act would be valid, i.e., that the law is unconstitutional in all of its applications." *Wash. State Grange v. Wash. State Republican Party*, 552 U.S. 442, 449 (2008) (internal citations omitted) "…A facial challenge must fail where the statute has a "plainly legitimate sweep." *Id*. The fact that a popular television show must take caution not to intrude into people's private lives or capture them on film where people have a reasonable expectation of privacy does not make a penal statute unconstitutional. There is a "plainly legitimate sweep" that O'Keefe cannot overcome.

CONCLUSION

According to the Supreme Court, a law may be facially invalid under a First Amendment analysis if "a substantial number of its applications are unconstitutional" Defendant O'Keefe has offered a few hypothetical situations involving a husband secretly taping his wife, Punk'd, and a person who is audio-taping only his own voice in a conversation. It unclear how taping only one's own voice would even fall under Penal Code section 632. "The overbreadth of a statute must not only be real, but substantial as well." *Broadrick v. Oklahoma*, 413 U.S. 601, 615 (1973). Defendant O'Keefe cannot show that Penal Code section 632 is overbroad and his Motion to Dismiss must be denied.

Respectfully submitted,

Dated: March 28, 2011

/s/ Eugene G. Iredale
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